FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 441.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE COURT PRESS, N. Y. C.

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AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, AMERICAN SAFETY TABLE COMPANY, prays that a writ of *certiorari* issue to the United States Court of Appeals for the Third Circuit for the review of the order of said Court, entered on July 6th, 1948. *American Safety Table Company* v. *Singer Sewing Machine Company,* 169 Fed. (2d) 514 (not officially reported).

The order was entered on the application of Singer Sewing Machine Company, the respondent, praying for recall of the mandate of the Circuit Court of Appeals issued October 17th, 1938, which had sustained petitioner's appeal from the dismissal of its patent infringement suit against respondent, and praying for a reargument of that appeal. The princi-

pal ground asserted by Singer Sewing Machine Company in support of its application was the disqualification of the late J. Warren Davis, one of the Judges who heard the appeal, because of corruption said to have occurred in another earlier case (*Root Refining Co.* v. *Universal Oil Products Co.*, 78 Fed. (2d) 991, procedure to vacate mandate reviewed 328 U. S. 575, hereinafter called the *Root* case), in which neither this petitioner nor the respondent were parties and which had been argued before the Circuit Court and decided by it some time before the argument of the appeal in this case. In its petition, Singer Sewing Machine Company asked only for reargument of the appeal before a competent tribunal. Singer relied entirely on the White report (see 328 U. S. 575 at 580) regarding the relationship between Kaufman and Davis. That relationship was disclosed in the *Root* case and it was not until the White report became public that Singer moved for reargument in this case.

The petition did not charge any wrongdoing on the part of American Safety Table Company and relied entirely on the findings of the Special Master in the *Root* case concerning an illicit agreement between Judge J. Warren Davis and a lawyer, Morgan S. Kaufman.

No wrongdoing on the part of American Safety Table Company has ever been alleged in this proceeding and the allegations and proof have shown only the following:

That the petitioner did retain Morgan S. Kaufman as one of its attorneys on its appeal to the Circuit Court and that J. Warren Davis was one of the Judges who heard that appeal and that in other cases

not at all related to this case there had been a corrupt understanding between Davis and Kaufman.

Testimony was given as to the fact of hiring and the legitimate reasons therefor, and no contradictory testimony was received. Nevertheless, the Circuit Court found that Kaufman had been hired by the petitioner for the sole purpose of employing his personal intimacy and influence with Judge Davis.

The respondent had asked only for opportunity to reargue the appeal before an impartial court. The Court below has not only recalled the mandate but has ordered that the petitioner's patent case be dismissed without any reargument.

Jurisdictional Statement

Jurisdiction of this Court is invoked under 28 USC 1254(1) (formerly Section 240 (a) of the Judicial Code, as amended by Act of February 13th, 1925). The order, of which review is sought, was entered on July 6th, 1948. The time of the petitioner to file this petition was extended to December 1st, 1948, by order of Justice Burton, entered on the 10th day of September, 1948.

Summary and Short Statement of the Matter Involved

In this case, the Circuit Court of Appeals has vacated its own decree entered almost ten years previously, and has directed the District Court to dismiss the bill of complaint of your petitioner, American Safety Table Company. The Circuit Court has done this in the absence of any charges, testimony or any finding that the previous judgment in favor of your

petitioner was obtained by fraud upon that Court or that any one of the Judges of that Court had been influenced improperly by your petitioner or by Kaufman in this case.

Our matter, at the outset, is distinguished, therefore, from that of *Root Refining Company* v. *Universal Oil Products* (although both proceedings were tried together for convenience), since the Circuit Court in the *Root* case found that Judge Davis' action was influenced improperly by Kaufman in that case, that Kaufman was employed by Universal for that purpose and that the Stokley transactions were the means by which Judge Davis was compensated at least in part for his decision (Opinion, 169 Fed. (2d) 514 at 534).

Unlike the charges of corruption made in the *Root* case, here, no charge of fraud was made by the Singer Sewing Machine Company against your petitioner, American Safety Table Company, and the grounds for the petition are stated as follows:

> "That two of the three Judges who sat in this Court to hear argument on appeal were disqualified as follows:—
>
> "(a) J. Warren Davis, because there existed between him and one Morgan S. Kaufman, of counsel for plaintiff herein, what the conclusion adopted by this Court in *Root Refining Company* v. *Universal Oil Products Company*, F. (2d), , 62 U. S. P. Q. 114, declared to be a 'corrupt and illicit combination to obstruct justice'; and
>
> "(b) Hon. Joseph Buffington, because of infirmities of old age and consequent reliance at

> the time in question upon J. Warren Davis as testified by Judge Buffington himself in one of the trials of William Fox, J. Warren Davis and Morgan S. Kaufman."
>
> (Document A, Petition for Recall of Mandate and Re-Argument, p. 2).

The "corrupt and illicit combination to obstruct justice" had been found by Special Master Thomas Rayburn White[1] in the *Root* case.

In a second supplement to its petition, Singer Sewing Machine Company charges that the third judge who sat on your petitioner's case, namely, Judge Johnson, was also disqualified by reason of his unfitness as appeared by a report of the House Committee of the Judiciary (Singer's Second Supplement to Petition for Recall of Mandate and Reargument, Document K, p. 2).

It was admitted that your petitioner had employed the attorney, Morgan S. Kaufman; all of the other innuendos contained in the Singer pleadings were fully answered by your petitioner in its Answer to the Petition for Recall of the Mandate and Reargument and in its Answer to the Singer Second Supplement to Petition (Documents C and L).

Because the petition did not allege any facts or any

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[1] The hearings before Special Master White were conducted prior to any charges being made against your petitioner, American Safety Table Company, and were conducted without its participation or knowledge and the Special Master did not consider the *American Safety Table Company* v. *Singer Sewing Machine Company* case at all and there was no evidence introduced before him with reference specifically to this case. Even the findings of Special Master White were, upon the comment of the Supreme Court in its review of the *Root* case, 328 U. S. 580, 66 S. Ct. 1176, stricken out by the Circuit Court on June 20, 1947, thereby leaving the Singer petition in our case without basis in fact.

charges of wrongdoing against American Safety Table Company, a motion to dismiss the petition and rule to show cause was made but never directly decided by the Court (Document O, Statement of Plaintiff-Appellant in Support of Motion for Discharge of Rule to Show Cause).

But the Court thereafter "visualized" this proceeding to be an investigation into the integrity of the Court and no longer a case or controversy between private litigants as appears most clearly from the minutes of the last hearing held on October 25, 1948 (pp. 20 to 24), and from the order of the Court subsequently entered upon applications of the parties for the allowance of costs and counsel fees (October 27, 1948 as amended October 29, 1948). At the hearing on October 25th, the Court said:

> "The proceeding in these cases which we had some years ago or more, were instituted originally at the instance of certain private parties, but the proceeding itself was undertaken and prosecuted as an investigation by the Court itself into the integrity of its own judgment" (pp. 20, 21—hearing of October 25, 1948).

Taking that view of the matter, the Court of its own motion, in an order dated April 6, 1948, framed questions for investigation which it chose to call "charges". No such "charges" had been presented by Singer in this proceeding and no factual bases had been alleged therefor.

Those so-called "charges" and their ultimate disposition by the Court are as follows:

> "(a) Whether Judge Davis' action in this case was influenced by any expectation of gain or

favors pursuant to an agreement or understanding to that effect with Morgan S. Kaufman."

Disposition—No finding.

"(b) Whether certain transactions effected in the latter part of 1935, whereby Morgan S. Kaufman advanced the sum of $10,000 to one Charles Stokley, a cousin of Judge Davis, and also whether certain other transactions between Judge Davis and Morgan S. Kaufman in the period 1935 to 1938, allegedly related to the litigation evolving from the bankruptcy of one William Fox, were part of a corrupt and illicit combination between Judge Davis and Kaufman to obstruct justice, and, if so, whether Judge Davis were disqualified from participation in the appeal in this case by virtue of that combination."

Disposition—No finding.

"(c) Whether Morgan S. Kaufman was employed or retained by American Safety Table Company in connection with this case, and, if so, whether the purpose of such employment or retainer was the expectation of American Safety Table Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with this case."

Disposition—Found.

"(d) Whether Judge Buffington, by virtue of his physical condition in 1938 and his reliance upon Judge Davis, was disqualified from participation in the appeal in this case."

Disposition—No finding.

"(e) Whether, in the light of the findings of the Committee on the Judiciary of the House of

Representatives in respect of Judge Johnson's conduct in office, Judge Johnson was disqualified from participation in the appeal in this case."

Disposition—No finding.

(169 Fed. (2d) 514: re issues p. 536, re disposition p. 541).

With regard to the issues "a", "b", "d" and "e", the Circuit Court states that in view of its opinion with regard to issue "c":

> ". . . there will be no need to consider whether or not in this case Kaufman actually succeeded in exerting an improper influence upon Judge Davis, or whether upon the evidence before us, excluding the testimony of Davis and Fox, the Stokley and Fox transactions were part of a corrupt and illicit combination between Davis and Kaufman or whether Judges Buffington and Johnson were disqualified in this appeal" (169 Fed. (2d) at 541).

Thus the sole finding against your petitioner is that Kaufman was employed with the "expectation" that he would exercise an improper influence on Judge Davis and that finding has been made in the absence of any evidence that your petitioner knew or had reason to know at the time it employed Kaufman that he was personally intimate with the Judge or could improperly influence him. The Circuit Court has swept your petitioner into this unfortunate situation because the Court has been led into the natural error of assuming that the scandal, which later became a matter of public record, was known to everybody, including petitioner, at the time Kaufman was employed here. On the contrary, at that

time Kaufman's relationship with Judge Davis was not a matter of public knowledge; no charges had been preferred against either of them; no indictment; no disbarment proceedings; Kaufman was practicing law, and Judge Davis was regularly sitting on the bench; the proceedings resulting in the investigation of the *Root* case had not been initiated.

Hence, in the absence of any proof of fraud or improper conduct on the part of this petitioner or that the mandate of the Court was actually influenced in this case by any of the matters alleged by Singer or otherwise, the Court below has assumed, as a basis for its finding, that your petitioner knew that Kaufman had an improper influence over Judge Davis, and based on this unproved assumption has therefore inferred an evil intent on the part of your petitioner as the only possible reason for Kaufman's employment. This assumption, and the inference drawn from this assumption, are contrary to the proven facts and in conflict with the evidence, to which we will refer, of Kaufman's legitimate contribution to your petitioner's litigation.

Briefly, the salient facts presented to the Circuit Court at the trial before it are as follows:

Your petitioner, on March 7th, 1937, had filed an appeal in the Circuit Court of Appeals for the Third Circuit from the adverse decision of the District Court for the Eastern District of Pennsylvania which had dismissed your petitioner's suit against the Singer Sewing Machine Company and held invalid its patented claims to an instantaneous mechanical clutch for sewing machines.

In the District Court, your petitioner employed Augustus B. Stoughton and E. S. W. Farnum, Jr.,

of Philadelphia, as counsel. For the opening brief filed October 18th, 1937, in the Circuit Court of Appeals, your petitioner continued Messrs. Stoughton and Farnum and your petitioner added the firm of Levinsohn, Neiner and Levinsohn, of New York.

Both your petitioner's President, Louis Frankel, and the inventor, Max Voigt, were dissatisfied with the Levinsohn Firm and with the opening brief in the Court of Appeals which your petitioner had seen (Minutes, Vol. 8, pp. 2589 and 2592). Louis Frankel asked Mr. Stoughton if he could recommend a lawyer and Mr. Stoughton told Mr. Frankel that he (Frankel) had better go out and do that himself, but that Stoughton would be glad to cooperate (Minutes, p. 2536). Therefore, Louis Frankel was on the lookout for additional counsel.

The following facts are quoted from the Summary of Evidence prepared and filed by the Court of Appeals.

> "In New York Louis Frankel stopped to see his brother, David Frankel. David asked Louis to accompany him to a meeting he had arranged with Murray Becker, William Fox's attorney, in the Waldorf-Astoria Hotel, and Louis agreed to do so. The Frankels had been engaged in a real estate venture on Long Island with Fox in the twenties. This enterprise had not been financially successful, and in 1932 a settlement between the parties was effected. Fox gave David Frankel $25,000 and David gave Fox a five-year note for this amount, endorsed by his brothers, Joseph and Harry Frankel (Summary, p. 2).

* * * *

"The meeting between David Frankel and Becker, which Louis Frankel attended on this visit to New York in October or November of 1937, had to do with Fox's claim against David on the $25,000 note.

"At the conclusion of this meeting, Becker asked Louis Frankel as to the status of the *Singer* case. Frankel replied that he had lost in the District Court, and that he had come to New York in order to retain good counsel. Becker suggested that he employ Morgan Kaufman, and told him that Kaufman was the receiver of the S. W. Strauss Company and had an office in New York (Summary, p. 3).

* * * *

"The day after Becker's advice to Frankel to employ Kaufman, Louis Frankel went to see Kaufman and told him that he desired to retain him as general counsel for American Safety in connection with the *Singer* case, and that he wanted Kaufman to retain good patent counsel to prepare a reply brief and to argue the case in the Circuit Court. Louis testified that he was very much impressed with Kaufman's status as receiver of the Strauss Company, and with the offices he maintained in connection therewith. A week or so later, Louis and Harry Frankel came up to see Kaufman in New York, and Kaufman told them at this meeting that he thought there was a good chance of winning the case, and that he would retain the best patent counsel available. It was agreed that Kaufman should receive 25 per cent of any sum recovered from Singer and that American would advance Kaufman $5,000 to cover the costs of the appeal and the reten-

tion of additional patent counsel. It was also agreed that the money advanced to Kaufman for these purposes was to be credited against his 25 per cent contingent fee in the event of a recovery. Louis Frankel also testified that Kaufman was to repay this money in the event that the appeal was unsuccessful.

"Subsequently, the Board of Directors of the American Safety Table on November 23, 1937, passed a resolution authorizing the employment of Kaufman and the advance payment of $5,000 to him" (Summary, p. 4).

The foregoing facts as to Kaufman's employment were established by the testimony of your petitioner's President, Louis Frankel, called by the *amicus curiae* and examined before the Court (Minutes, Vol. 8, pp. 2529 to 2605), by the testimony of Louis Frankel's brother, Harry Frankel, examined on request of the *amicus curiae* by deposition taken at Miami, Florida, and actually read into the record before the Court (Minutes, pp. 2711 to 2754), and by the testimony of Morgan S. Kaufman called by the *amicus* and examined before the Court (Minutes, pp. 2626 to 2686).

All the witnesses in your petitioner's case were called by the *amicus* because he had the express duty in this proceeding to present available evidence whether or not in support of the "charges" (Order of April 6, 1948 and Opinion 169 Fed. (2d) 514 at 520 and 537). The testimony of Louis and Harry Frankel was the only direct evidence adduced by the *amicus* on the essential question of what your petitioner knew about Kaufman when it employed him and what its purpose was in employing him.

Murray Becker, the New York attorney, was not

called by the *amicus* and no reason was given by him why Becker was not called. The failure of the *amicus* to call Becker was in spite of the fact that the *amicus* had requested, and had been given, permission to take Becker's deposition and had served notice on the parties that Becker's deposition would be taken. (See Notice of Time and Place of Taking of Depositions served on the parties March 25, 1948, and the order authorizing the taking of such depositions filed March 27, 1948 herein.)

The failure to call Becker as a witness under these circumstances can not support any inference that his testimony would have been unfavorable to your petitioner. The correct inference would be directly to the contrary.

In arriving at its adverse finding contrary to the direct evidence, the Court sought justification in the circumstantial evidence of what it termed the "setting" under which Kaufman was employed. (169 Fed. (2d) 514 at 538.) On review this Court will note that the circumstantial evidence supports the direct evidence and that what was done in the employment of Kaufman by your petitioner was not merely consistent with an entirely innocent interpretation of its action, but was also natural, and compelled by the circumstances in which your petitioner found itself.

Your petitioner, a small company, had been in competition with the Singer Sewing Machine Company, which is of world-wide size. Petitioner had made a complaint to the Federal Trade Commission about unfair competition conducted by Singer from which the petitioner was suffering (Minutes, Vol. 8, p. 2539). The well-known attorney, George Medalie of New York, had been consulted about a year before the trial of the patent case with regard to this unfair competition and Mr. Medalie

had stated that he wanted $25,000.00 to handle the petitioner's grievances against Singer (Minutes, p. 2539).

Your petitioner was defeated in the District Court by the Singer Sewing Machine Company in the patent litigation. Petitioner's attorney, Mr. Stoughton, was in his late seventies and appearing in court less and less (Minutes, p. 2607). New counsel for the appeal, as well as counsel to supervise the unfair competition claim, were needed. Mr. Stoughton had professed that he could be of no help (Minutes, p. 2536). Mr. Otterbourg of New York, who was the family lawyer consulted from time to time on fiscal matters (Minutes, p. 2562) and not a member of a patent firm (Minutes, pp. 2563-2564), had advised your petitioner that as it was such a small company it was not in a position to pay the fees of counsel of equal prominence to that of Singer's (Minutes, p. 2595).

It was not until your petitioner had seen the main brief to be filed in the Circuit Court and was dissatisfied both with the brief and with the counsel it had then retained, that the urgent necessity for stronger counsel was presented. Mr. Kaufman was finally hired as general counsel in the case with regard to both the immediate patent appeal and litigation and with regard to the unfair competition (Minutes, p. 2538). The immediate setting, therefore, for his retention was the urgency of practically changing direction and counsel between the main brief and the reply brief and argument before the Circuit Court in the face of your petitioner's understanding that such new counsel would be very expensive and possibly beyond your petitioner's means.

Under these circumstances, no unfavorable infer-

ence can be drawn from the fact that your petitioner went to see Kaufman immediately upon the recommendation of Mr. Becker; nor from the fact that Kaufman was employed on a completely contingent retainer requiring only $5,000.00 for the immediate expenses of the Circuit Court argument; nor from the fact that Kaufman never undertook to handle the case alone but agreed to hire, within his original retainer agreement, the best patent lawyers available. As a matter of fact, after attempting to procure Senator George Wharton Pepper, Kaufman then procured the services of such masters in the patent field as the late Judge Haight and Mr. Samuel Darby of New York. Petitioner recognized the fact that neither it nor its other counsel could have retained such experts on such a favorable basis and on such short notice (Minutes, p. 2596). Any other inference, even if made at this late date, would be unrealistic.

The abstract of Kaufman's file (U. S. Exhibit No. 336), such of his letters as were quoted to the Court (Minutes, Vol. 10, pp. 3297 and 3300) and the testimony of the witnesses demonstrate that after Kaufman had procured the services of the patent counsel and after the favorable decision of the Circuit Court had resulted, your petitioner continued to rely upon Kaufman and to utilize his services. His retainer agreement was not exorbitant when judged either by the nature and details of your petitioner's claim against Singer or by the tentative award of the Special Master on the accounting (Minutes, Vol. 8, p. 2622).

Certiorari should be granted so that this Court may review the entire record. We feel confident that on such review it will develop that there was no evidence sustaining the order of the Court, and on the contrary

the positive evidence was all in favor of the innocence of American Safety Table Company.

Because your petitioner retained Kaufman, it has now been deprived of the judgment which it had obtained declaring that its patent was valid and infringed.

The decision was granted to your petitioner on March 19, 1938. (95 Fed. (2d) 543.) Petition by Singer for rehearing was filed and denied. Petition by Singer for *certiorari* to the Supreme Court was denied by this Court on October 10, 1938 (305 U. S. 622).

Six years thereafter, and, of course, well after the conclusion of the term at which the mandate was granted, the Singer Company filed, in the Circuit Court of Appeals, its Petition (dated September 26, 1944) for Recall of Mandate and Reargument of the Appeal (Document A), which opens with a statement that:

> "This is a petition by defendant-appellee for recall of the mandate and re-argument of the merits of this case."

The grounds for the petition (see p. 4 herein, *supra*) were entirely different from those on which the Circuit Court has finally acted. In any case, therefore, certainly the Court below has probably erred in dismissing petitioner's complaint (instead of merely granting a reargument) and thus forever depriving petitioner of a judgment declaring that its patent is valid and infringed and depriving it of its right to review an adverse decision of the trial court.

A certified transcript of the record of proceedings before the said Circuit Court of Appeals has been

furnished and your petitioner is moving this Court that for the purpose of this application the printing thereof be dispensed with.

Questions Presented

1. After the expiration of the term did the Circuit Court have power, on its own motion, to investigate its former judgment, in the absence of any charge or allegation of fraud, and enter its orders of June 20, 1947 and April 6, 1948?

2. Did the Circuit Court have power, after investigating the matter, to vacate its former judgment, in the absence of any charge, allegation or proof of fraud and enter its order of July 6, 1948?

3. Was there any evidence sufficient to sustain the conclusion of the court below that Kaufman was retained by the petitioner in the expectation that he would exercise or endeavor to exercise an improper influence on Judge Davis, and to sustain that Court's decision that the petitioner's complaint should be dismissed?

4. Did the Circuit Court have power to try, as a court of first instance, disputed questions of fact and to decide the dispute and on the basis of that decision to affect the property rights of your petitioner and dismiss its complaint?

5. On a motion for reargument of an appeal and upon an order to show cause issued by the Court itself why such reargument should not be granted, did the Court of Appeals err in not passing upon the motion

for reargument, and in place thereof, ordering judgment dismissing petitioner's complaint?

6. When on the Court's own initiative this proceeding became an "investigation" of "charges" framed by that Court, and the Court was no longer engaged in deciding a "case or controversy" between parties, was it beyond the constitutional power of the Circuit Court to enter an order dismissing petitioner's complaint?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

Exercise of the power of this Court to grant the writ of *certiorari* is prayed for upon the following grounds:

1. The Court should review the findings and conclusions of the Court of Appeals, which has acted as a court of first instance, and the petitioner should be granted one review of the facts and law to which, from olden times, a litigant has been entitled as a matter of right.

2. This Court, being the only Court of review, should examine the evidence, and determine whether there is any support for the conclusions of the Court below.

3. The proceeding in this case was unprecedented, and important questions of jurisdiction of the Court of Appeals and procedure in matters of this kind are involved and the record should be reviewed by this Court.

4. The decision below adjudicates corruption on

the part of a former Judge of that court and the grave public importance of that decision and its undeniable effect on your petitioner's case requires its review by this Court.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Court directed to the Court of Appeals for the Third Circuit, commanding that Court to certify and to send to this Court, for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of all proceedings in this case instituted by the petition of the respondent for the recall of said Court's mandate and for reargument; and further prays that the order of the Circuit Court of Appeals for the Third Circuit, entered July 6th, 1948, may be reviewed by this Court, and that your petitioner may have such other and further relief in the premises as to this Court may seem just.

November 12, 1948.

AMERICAN SAFETY TABLE COMPANY,
By: LOUIS FRANKEL,
President.

EDWIN M. OTTERBOURG,
LEON J. OBERMAYER,
Attorneys for Petitioner.

CHARLES A. HOUSTON,
FREDERIC P. HOUSTON,
GEORGE B. CLOTHIER,
Of Counsel.

Verification.

State of New York,
County of New York—ss.:

LOUIS FRANKEL, being duly sworn, deposes and says:

That he is President of American Safety Table Company, the petitioner named in the foregoing petition; that he has read the foregoing petition; that the same is true to the best of his knowledge, information and belief.

LOUIS FRANKEL.

Sworn to before me this
12th day of November, 1948.

STANLEY H. SCHINDLER
Notary Public, State of New York
N. Y. Co. Clks. #2558
My Commission Expires Mar. 30, 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. .

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

—against—

SINGER SEWING MACHINE COMPANY,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions and Orders Below.

The order of the Circuit Court of Appeals, Third Circuit, of which review is sought, was entered on July 6, 1948, and is filed in this Court on certificate of the Clerk of the Court below.

The opinion of the Court of Appeals is reported in 169 Fed. (2d) 514.

The order sought to be reviewed was preceded by an order of the Court of Appeals dated June 20, 1947, directing the petitioner to show cause why the mandate should not be recalled and the cause returned to the argument list. This was followed by an order of that Court entered April 6, 1948, consolidating this case with the *Root* case to a certain extent and setting

forth the charges that were to be tried. The two foregoing orders have also been certified to this Court by the Clerk of the Circuit Court of Appeals as part of the record in this case.

The order of the Court of Appeals filed October 27, 1948, passing on the question of costs and allowances in this proceeding, is filed with this Court by express permission of the Court of Appeals.

Jurisdiction.

The facts supporting the jurisdiction of this Court are set forth in the petition.

Such jurisdiction is invoked under 28 USC 1254(1) (formerly Section 240 (a) of the Judicial Code, as amended by Act of February 13, 1925).

Statement of Facts.

The facts are sufficiently set forth in the petition.

Specification of Errors.

If the writ is granted, petitioner will urge that the Court of Appeals in the instant proceeding erred in the following respects:

1. In investigating, on its own motion, its former judgment, in the absence of any charge or allegation of fraud, more than six years after the expiration of the term and entering its orders of June 20, 1947 and April 6, 1948.

2. In sitting as a court of first instance and hearing conflicting evidence and deciding disputed ques-

tions of fact and entering its order of July 6, 1948, dismissing the complaint.

3. In deciding that there was evidence sufficient to sustain the conclusion that Kaufman was retained by the petitioner in the expectation that he would exercise or endeavor to exercise an improper influence on Judge Davis, and to sustain the Court's decision that the petitioner's complaint should be dismissed.

4. In vacating its former judgment in the absence of any charge, allegation or proof of fraud and entering its order of July 6, 1948.

5. On a motion for reargument of an appeal, and upon its own order to show cause why such reargument should not be granted, in failing to pass upon the motion for reargument and in place thereof on July 6, 1948, ordering judgment dismissing petitioner's complaint.

6. When, on its own initiative, it changed this proceeding into an "investigation" of "charges" framed by the Court, and it was therefore no longer engaged in deciding a "case or controversy" between parties, the Court erred in going beyond its constitutional power (Article III Section 2) by entering its order of July 6, 1948, dismissing petitioner's complaint.

POINT I.

The Court should review the findings and conclusions of the Court of Appeals, which has acted as a court of first instance, and the petitioner should be granted the one review at least of the facts and law to which a litigant, from olden times, has been entitled.

The matter was tried by the Circuit Court as a court of first instance. Witnesses were examined, facts were decided and conclusions of law drawn by that Court and substantial rights determined. There is no procedure by which a review can be had of the findings of fact or conclusions of law except by *certiorari* issued out of this Court.

Throughout the early history of the common law, the necessity for the correction of errors by some other Court than that which passed upon the case was recognized and, as early as the Second Statute of Westminster (1285), Parliament was implementing with a "bill of exceptions" from the trial court the already established "writ of error" from the reviewing court.

> Theodore Plucknett, "A Concise History of the Common Law", 3rd Ed., page 29.

The evolution in the law of that time of a recognized "procedure in error" is traced by Pollock and Maitland in Volume II of their "History of English Law" (1895) at pages 661 to 665 and Roscoe Pound, in his volume "Procedure in Civil Cases" in the section on "Procedure in the King's Bench on Error to the Common Pleas, etc." published under the au-

spices of the National Conference on Judicial Councils, has summarized the history at page 47 as follows:

> "The writ of error * * * was grantable in all cases except treason and felony *ex debito justitiae*, as a matter of right."

The New York Court has said in *Yates* v. *People*, 6 Johnson 337, at p. 364, by Senator Clinton, speaking for the majority:

> "Our law considers it an essential right of a suitor to have his cause examined in tribunals superior to those in which he considers himself aggrieved."

And from the same case, page 456:

> "In order to guard against the fallibility of the human understanding, and to shield the citizen from the attacks of injustice, it may be regarded as a cardinal principle in our laws, that no single tribunal is intrusted with the sole determination of a man's property."

In an early case in the State of Maryland, the Court said:

> "It has always been regarded here, as well as in England, as a constitutional right of every citizen to have his case reviewed, in one form or other, by a court of error. * * *
>
> "This right of appeal seems to have been conceded to the citizen by the common law, in all civil cases, without check, or control of any kind whatever. A writ of error was granted, on demand, as a matter of right." *Ringold's Case*, 1 Bland (Md) 5, at page 7.

The late Chief Justice Taft of this Court, in requesting general statutory limitation of the right of appeal from the Circuit Court, wrote to Senator Copeland on December 9, 1924, as follows:

> "The theory of our system is a correct one, namely, that the district court and the circuit court of appeals shall furnish all the hearings that any litigant should have, and that the business of the Supreme Court should be to consider and decide for the benefit of the public and for the benefit of uniformity of decision only questions of importance. *The appeal to us should not be based on the right of a litigant to have a second appeal*" (Congressional Record, February 3, 1925, page 2920, italics ours).

Senator Cummins, moving the legislation for passage, stated:

> "It will be remembered that any case that reaches the circuit court of appeals has already been tried in the district court of the United States, * * * and it is believed, I think, by most people who have examined the subject, that when a litigant has had an opportunity to try his case *in two courts,* * * * any further appeal or review of the case ought to be in the discretion of the Supreme Court of the United States, and not a matter of right with the litigant" (Congressional Record, January 31, 1925, page 2752, italics ours).

After the passage of the Act of February 13, 1925, the late Chief Justice Taft explained the legislation and stated:

> "The sound theory of that Act (March 3, 1891) and of the new Act (February 13, 1925) is that

litigants have their rights sufficiently protected by a hearing or trial in the court of first instance and by one review in an immediate appellate Federal Court" (The Jurisdiction of the Supreme Court under the Act of February 13, 1925, 35 Yale Law Journal 1, at 2).

Chief Justice Taft was expressing what has always been taken for granted, namely, that each litigant shall have the right to at least one appellate review of the findings of fact and conclusions of law decided against him. Ordinary litigation, therefore, which originates in the District Court is safeguarded by one review as a matter of right in the Court of Appeals.

In the present case, however, the proceeding originated in the Circuit Court, and it was tried there, while the writ of *certiorari* can issue from the Supreme Court solely as a matter of judicial discretion. We contend that this discretion should be exercised in favor of this litigant in order that there shall be at least one review of the result of that litigation.

Whatever the rule may be in criminal cases, the right of one review in civil cases has not, so far as we have been able to find, ever been questioned, unless interdicted by some controlling statute. The propriety of one review has been taken for granted by this Court.

McLish v. *Roff*, 141 U. S. 661;
Ex Parte Bigelow, 113 U. S. 328.

In the *McLish* case, this Court said:

"From the very foundation of our judicial system, the object and policy of the acts of Congress in relation to appeals and writs of error,

(with the single exception of a provision in the Act of 1875 in relation to cases of removal, which was repealed by the Act of 1887) have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it, decided in a single appeal" (141 U. S. 661 at p. 665).

In *Ex Parte Bigelow,* the Court said:

"No appeal or writ or error in such case as that lies to this court. The act of Congress has made the judgment of that court (Supreme Court of the District of Columbia) conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain" (113 U. S. 328 at 329).

One review as of right in ordinary litigation has universally been provided by legislative action in Anglo-Saxon jurisprudence. We cannot argue, in this extraordinary case, that the petitioner has the absolute right of one review of the adverse decision of the Circuit Court, but we can follow the age-old rule that unless there is at least one review, justice has not been done.

That review can be obtained in this case by the exercise of the judicial discretion of this Court in the granting of the petition for the writ of *certiorari* for which we respectfully ask.

POINT II.

This Court should review, in the interests of justice, the action of the lower Court in granting the drastic relief of a dismissal of the complaint, without charges of wrongdoing on petitioner's part and without evidence establishing such wrongdoing.

We shall not repeat the analysis of the evidence set forth in pages 3 *et seq.* of the accompanying petition. It should be sufficient to say that petitioner has been found guilty of retaining Kaufman for the sole purpose of using his personal intimacy with Davis to favor petitioner.

The "evil intent" with which petitioner employed Kaufman is emphasized and lies at the very foundation of all action taken by the Court against the petitioner.

The Court has assumed that petitioner knew of Kaufman's intimacy with Davis, but there is not a shred of evidence to that effect in the case; it was an unwarranted assumption.

The Court of Appeals, we contend by hindsight, has based its conclusion against your petitioner on an assumption that the relationship between Davis and Kaufman was well known in legal circles in the Third Circuit (169 Fed. (2d) 514 at 525 and at 539). The Court, in its opinion, failed to advert to the uncontradicted evidence that your petitioner, immediately upon engaging Kaufman brought him to see Mr. Stoughton and Mr. Stoughton and Mr. Kaufman thereafter cooperated in the case (Minutes, Vol. 8, p. 2537). If Kaufman's reputation in the Third Circuit at that time was as bad as the Circuit Court seems to believe, is it conceivable that Mr. Stoughton, acknowledged to be the dean of Philadelphia patent

bar, would have continued active and as counsel of record in your petitioner's case? If Mr. Stoughton and his associate, Mr. Farnum, continued in the case after the retention of Mr. Kaufman, it is far fetched to assume that the officers of your petitioner, who were laymen without previous litigation experience in the Third Circuit, should have known anything discreditable about Kaufman; or knowing it, would have paraded Kaufman before Stoughton.

In this case, a former judgment of the Court of Appeals is attacked on the ground that it was procured by fraud upon the Court and the other litigant. In such case, the fraud or wrongdoing must be shown by "clear and convincing proof". Or, as expressed in one of the cases:

> "Evidence must be clear, unequivocal and convincing and it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."
>
> *McDonnell* v. *General News Bureau, Inc.*, 93 Fed. (2d) 898.
> *U. S.* v. *Maxwell Land Grant Co.*, 121 U. S. 325.

In the case of *Schneidermann* v. *U. S.*, 320 U. S. 118, in which the Government sought to set aside a certificate of naturalization on the ground that it was procured by fraud, the Court said, at page 125:

> "To set aside such a grant the evidence must be 'clear, unequivocal and convincing'—it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

This certificate of naturalization was referred to in that case as a judgment, which is exactly what it

was. The judgment in this case cannot be set aside on bare assumptions and equivocal inferences.

At this point, we can disregard the positive evidence given by the petitioner as to the very proper reasons for Kaufman's retention and can treat the case as though no such evidence had been given.

Still, the respondent has the burden of establishing all the facts necessary to prove that the petitioner had knowledge of Kaufman's influence over Judge Davis and that the petitioner hired Kaufman with the intent that he should use such intimacy with the Judge.

The result reached by the lower Court is erroneous, and it is essential, in the interests of Justice, that the writ of *certiorari* should issue and the record be reviewed by this Court.

POINT III.

This Court should review the important question of federal procedure arising out of the unprecedented action of the Circuit Court in (1) exercising original jurisdiction to hear and determine disputed facts, (2) disregarding the relief prayed for by the Singer Company and (3) changing the nature of the proceeding from a motion for reargument in a case between private litigants into an investigation by the Court of the integrity of certain ex-members, which is not a case or controversy under Article III, Section 2 of the Constitution.

Fortunately, matters of this kind have been rare. The procedure, we contend, has not been definitely settled. The Court should review the procedure adopted by the Circuit Court because of the following probable errors.

(1)

Unlike the case presented in *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.,* 322 U. S. 238, in which the facts were conceded, the vital facts here were controverted. The pivotal question in our case became the intent, whether vicious or innocent, of American Safety Table Co. in hiring Kaufman.

On that issue the Court took testimony, decided facts, and drew inferences from conflicting facts and finally issued the drastic order dismissing petitioner's complaint.

The Court of Appeals by statute has only appellate jurisdiction. It must be clear that in this instance the Court of Appeals has exercised all the powers of a Trial Court of first instance.

It is true that by judicial decision there has been engrafted on the statute an exception, to wit, that when necessary to aid or protect appellate jurisdiction, these Courts may exercise original jurisdiction. *United States* v. *Mayer,* 235 U. S. 55.

It might have been necessary, to protect appellate jurisdiction, for the Circuit Court to have decided the question of a reargument of the original appeal because essentially that question of reargument, it seems to us, is one of discretion upon which only an Appellate Court can pass. In that sense it might have been necessary for the Court to have done so here.

But the Circuit Court never passed on the question of reargument, and instead, on its own motion, entered upon an investigation and proceeded to decide controverted questions of fact and concluded by dismissing petitioner's complaint.

We contend that this procedure was not necessary

"in order to aid its appellate jurisdiction". If there had been any complaint by the Singer Company requiring the vacation of the judgment, that complaint could have been followed up in an appropriate action not requiring of necessity an investigation by the Circuit Court of Appeals.

In *Hazel-Atlas Glass Co.* v. *Hartford Empire Co.*, 322 U. S. 238, there were no disputed questions of fact; the facts establishing the fraud were admitted. It was not necessary there for the Appellate Court to exercise the powers of a trial court in passing on disputed factual issues.

The prevailing opinion in that case emphasizes that fraud had been shown without dispute. Preceding a statement of facts, the Court said:

> "The following facts were shown by the record without dispute" (p. 240).

And again, at page 247:

> "We have, then, a case in which undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered."

This emphasis on the absence of any dispute as to the facts is probably the answer to the point raised in the dissenting opinion, wherein Justice Roberts said:

> "The Circuit Court of Appeals is without authority either to try the issues posed by the petition and answer on the affidavits on file, or, to

do as the dissenting judge below suggests, hold a full dress trial.

The federal courts have only such powers as are expressly conferred on them. Certain original jurisdiction is vested in this court by the Constitution. Its powers as an appellate court are those only which are given by statute. The circuit courts of appeal are creatures of statute. No original jurisdiction has been conferred on them" (p. 257).

In that case, where the facts were not in dispute, it may have seemed a senseless circuity of action to have referred the aggrieved party to the District Court rather than to permit the Circuit Court to clear its own records.

In our case, the Circuit Court committed probable error in following the *Hazel-Atlas* case, where the circumstances were entirely different and where it was called upon to decide disputed questions of fact.

Petitioner asks this Court to review the action of the Circuit Court for the purpose, among other things, of settling the important question of jurisdiction and procedure involved in this case and limiting the scope of the *Hazel-Atlas* case.

(2)

Unlike the proceeding in the *Hazel-Atlas* case (322 U. S. 238 at 239) which was based on a petition to the Circuit Court for leave to file a bill of review in the District Court, the proceeding in our case was, at its inception, merely an application by a defeated litigant for permission to re-argue the appeal.

That purpose was emphasized by the order of the

Circuit Court entered June 20, 1947, which called upon the petitioner to show cause why the mandate should not be recalled and the case returned to the argument list.

It is significant that the motion for reargument was never decided by the Circuit Court; it neither granted it nor denied it.

Instead of passing on the motion for reargument, the Court changed the direction of the proceeding and converted it into an investigation of the integrity of the bench and as a result of that investigation ordered the dismissal of the petitioner's complaint. Such disregard of the terms of the prayer for relief and the order to show cause ought to be reviewed.

(3)

The Constitution, Article III, Section 2, limits the judicial power of the federal courts to the decision of "cases or controversies".

At its inception, this proceeding may be called a "case" between two private litigants in which one asked for a specific remedy and the other resisted.

But as we have seen in the Statement of Facts (p. 6 herein), the Circuit Court did not consider itself bound by the limits thus prescribed, and on its own motion went outside those boundaries and entered upon an "investigation" required neither by the pleadings of the parties nor the relief asked. The pleadings did not allege any fraud or wrongdoing by your petitioner. Nevertheless, there has been an extensive investigation of that phase of the case and the Court has never directly decided petitioner's objection and its motion to dismiss Singer's petition and the rule to show cause of June 20, 1947. The pleadings did not demand relief beyond the granting

of a motion for reargument which even the Court recognized in its rule to show cause of June 20, 1947. Nevertheless, the Court has not decided the motion for reargument but rather, on its own motion and as a result solely of its "investigation" dismissed your petitioner's complaint. As a result, the proceeding in the Circuit Court can be "visualized" only as an investigation *pro bono publico* and had ceased to be a "case or controversy" between private litigants.

All of this procedure, which we claim as erroneous, was likewise unprecedented. The record should be examined and reviewed by this Court and a writ of *certiorari* should issue.

POINT IV.

The decision below adjudicates for the first time corruption on the part of a former judge of the Circuit Court and grave public importance of that decision, as well as its prejudicial effect on this petitioner, requires its review by this Court.

The Court below in this proceeding relied very strongly on alleged bribery of Davis by Kaufman and Fox in what is called the Fox transactions and also, on alleged bribery of Davis by Kaufman in what is called the Stokley transaction.

Neither of these matters concerns in any way the American Safety Table Company or its case against the Singer Sewing Machine Company; nor was any charge or effort made to connect American Safety Table Company with either of these transactions; but the alleged corruptibility of the Court seems to have weighed heavily with the Circuit Court in deciding our case.

In the Fox transactions, Davis and Kaufman were both indicted and tried twice and in each case the jury had disagreed (Opinion, 169 Fed. (2d) 514 at 517).

The Stokley transaction was examined by Special Master White and is referred to in his report, confirmation of which was subsequently withdrawn by the Circuit Court of Appeals after the criticism of the White report contained in the opinion of this Court reported at 320 U. S. 575 at 580.

Davis had died prior to the investigation in this case, and the only testimony given by him or on his behalf in this proceeding was the reading of his testimony taken before Special Master White.

The finding of the Circuit Court that there was corruption in the Stokley and Fox transactions is the first adjudication on that subject and should be reviewed by this Court.

CONCLUSION.

In order to secure to the petitioner the right to one review which has always been a part of our conception of just process and in view of the probable errors of the Circuit Court committed in this unprecedented proceeding, and to correct those errors, the petition for the writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 441.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR PETITIONER.

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REPLY BRIEF FOR PETITIONER.

We regret that a reply is required here but statements made by Amicus and Singer do need correction. Nothing could be more unjust and unfair than to treat American's case (No. 441) as though it were the same as Universal's (Nos. 439 and 440). The facts, proof, charges and findings of the court below, and the issues on this application for certiorari are very different. Yet, in an attempt to have this Court repeat the errors committed below in treating both cases the same, we find the following in the briefs of Amicus and Singer.

(a)

Amicus mis-states the "Questions Presented" (Amicus Brief, p. 2). It omits to point out in its Question 1 that in American's case the lower court's inquiry and decision was had in the *absence of any allegations, proof or finding that the judgment under attack was obtained by fraud upon the Court of Appeals* or *that in its rendition anyone of the judges of that court had been influenced improperly by your petitioner or by Kaufman in this case.* The omission by Amicus of this fact which particularly distinguishes this case from the Universal case does not square with the duty placed upon Amicus in this case to "present to the Court the available evidence bearing upon the charges whether or not in support thereof to the end that the truth might be ascertained" (Op. 44-45).

Petitioner's Questions 1 and 2 correctly present important questions which should be reviewed by this Court because in American's case there was the absence of any charge, allegation or proof of fraud.

Nowhere in the record did Singer allege any fact tending to prove that the judgment under attack was procured by fraud upon the court or that any member thereof was improperly influenced to grant the judgment in this case. Hence, the court below received no evidence and made no finding as to any such fraud or improper influence on the part of American. Nevertheless, Singer incorrectly asserts at page 2 of its brief that petitioner's Questions 1 and 2 (and also 6) have "no foundation in fact".

(b)

Petitioner's Question number 3 has no parallel in the Universal case. It presents for review whether on this record there was any evidence sufficient to justify reopening the judgment and dismissing the complaint. In this question, which is touched on by Amicus in its brief at page 2 under its Question 2, Amicus would have this Court understand that the only question is whether the evidence supported the one finding which the court made.

But the question to be considered by this Court actually involves also the proposition of law that even if there were evidence, which we deny, that a litigant employed a lawyer because it thought he had influence, in the absence of proof that the judgment was affected by the employment of such lawyer, has the court power to reopen the judgment and dismiss the complaint? This question of law is not presented in the Universal case but it is of primary importance in this case.

Had all of the charges against American been found by the court as they were found in the Universal case, it may be that the power to dismiss the complaint existed. But the finding on only one of them cannot support here the judgment of dismissal. It is absurd to imply as Amicus (Amicus Brief, p. 5, n. 6 & p. 9) and Singer (Singer's Brief, p. 3) do that American consented to such a procedure.

(c)

Amicus incorrectly attempts to create the impression that material and important facts in American's case were largely undisputed (Amicus Brief, p. 9).

It does not square with the duty imposed upon Amicus by the court below that it fails to apprise this Court that all the testimony of every witness bearing directly on the essential issue of why American employed Kaufman is absolutely contrary to the finding of the court below (see our petition, p. 12).

(d)

Singer falsely charges in its brief, page 7, that Becker's name was not brought out into the open until the examination of Harry Frankel, on April 15, 1948. Singer knows this to be false because Amicus on March 25, 1948, had already served notice of the time and place of taking Becker's deposition (see Notice of Time and Place of Taking Depositions and Singer's own statement to the court, Document R, p. 11, filed March 23, 1948).

(e)

As to the important issue as to what American knew about Kaufman or why it employed him, Amicus in no way answers or explains its failure to call Becker to which attention is sharply called in our petition, pages 12 and 13, and which appeared to be of importance to the court below (Op., p. 49, n. 8).

Amicus does not reply to the self-evident proposition that having given notice that it intended to call Becker as a witness, the failure to go forward and introduce his testimony would support the inference that Becker's testimony would not have been contradictory or unfavorable to American.

Amicus does not apprise this Court that unlike the situation in the Universal case, Kaufman was not

under any "stand-by" retainer with American and that the uncontradicted testimony is that he was employed to render admitted and legitimate services in the selection and employment of ex-Judge Haight and Samuel Darby, Jr., at very reasonable fees, that he held conferences on the case and that he continued to render services to American as his file demonstrated.

So even on this one issue as to the purpose for which American retained Kaufman, neither Amicus nor Singer answer the charge made in our brief, page 30, that the finding of the court below was not made on that clear, unequivocal and convincing evidence which would leave the issue free from doubt.

This presents as a matter of law to this Court the question of whether on such inconclusive evidence admittedly so different than that introduced in the Universal issue, the Court of Appeals had the power to reopen its judgment and dismiss American's complaint.

Further, as pointed out in our petition, page 13, on review, this Court will find that all of the circumstantial evidence supports the direct evidence that the employment of Kaufman was consistent with an entirely innocent interpretation of American's action under the circumstances in which it found itself.

Conclusion.

The Court should satisfy itself as to whether the indignation of the court below at the situation so far as Kaufman and Davis are concerned, did not blind that court to the great difference between Universal's case and that of your petitioner, American Safety Table Company, and that in all fairness and in justice to the substantial property rights of American Safety

Table Company so arbitrarily taken away by the order of the court below, the whole record should now be reviewed by this Court and this application should be granted so that justice may be done.

Respectfully submitted,

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IN THE

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October Term, 1948

No. 441

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI *

The petition for certiorari seeks review of a judgment entered July 6, 1948, by the Court of Appeals for the Third Circuit. The opinion is reported in 169 F. (2d) 539.**

* This is a companion case to *Universal Oil Products Co.* v. *Root Refining Co.*, Nos. 439-440, this term (the *Universal* cases), see Order April 6, 1948. By order of June 20, 1947, the court authorized the appearance of the United States as *amicus curiae* in this case and the *Universal* cases.

** Petitioner here, as in the *Universal* cases, moved to dispense with printing the record for purposes of its petition for certiorari. Respondent does not oppose this motion; however, Amicus has filed a printed copy of the opinion and reference to pages of that copy will be made in this brief as (Op. —). Pages in trial transcript will be designated (R. —), pages in petition (Pet. —) and proceedings before trial (p.t. —).

In this case the court below conducted an inquiry into the integrity of one of its own judgments, the possible corruption of which was called to its attention by Respondent's (Singer's) petition for reargument of September 26, 1944 (document "A").* Inasmuch as Petitioner (American) fails to set forth in full the pertinent facts in this case, we wish to include herein by reference and call to this Court's attention the facts as set forth in the Government's brief in opposition under heading "Statement", and Singer adopts the same for the purpose of this brief.

Most of Petitioner's "Questions Presented" (Pet. 17, 18) have no foundation in fact. For example, Questions 1, 2 and 6 are based on the erroneous assumption, as we show hereafter, that Singer made no charges of fraud and that the "charges" as set forth by the court below in its order of April 6, 1948, were "framed" by it and have no basis in any statement by Singer or the Government. It is believed that the "Questions Presented" set forth in the Government's brief are the only questions involved in this case, and accordingly Singer adopts them for the purpose of this brief.

ARGUMENT

I.

American seeks in its petition to convey the impression that the court below was bound to act solely on the specific prayer for reargument in Singer's petition for reargument (document "A", Pet. 1, 2, 4, 6, 34). That petition served only to start the present proceedings. Thereafter the court acted in the exercise of its power to determine whether or

* At the suggestion of the court below each printed document filed in this case before the trial was given an identifying letter and these will be used in this brief.

not its judgment of October 17, 1938 was tainted by fraud. The controversy between the private parties was properly relegated to a subordinate position. *Hazel-Atlas Co.* v. *Hartford Empire Co.*, 322 U. S. 238, 246.

Moreover, the record shows that Singer requested (document "N") and American consented to the court's going beyond the mere granting of reargument (Op. 45). As early as June 20, 1947, the court below ordered American to show cause why the judgment of October 17, 1938, should not be set aside, to which American filed a general denial of wrongdoing (document "M").

At the request of the court, Singer and United States filed statements of charges and issues as follows: February 11, 1948 (document "N"); March 2, 1948 (document "P"), and March 23, 1948 (document "R"). Thereafter, on the basis of these documents the court formulated in its order of April 6, 1948, the charges "that have been made and are to be tried" (Op. 43-45).

At a hearing on March 23, 1948, these issues were read aloud and the parties invited to comment (p.t. 148-164).* American did not offer any objection to the issues as stated or to the procedure proposed (p.t. 162, 164).* Subsequently a pre-trial conference was held at which the question was discussed whether the inquiry should be limited to the propriety of granting a reargument. The court below concluded and announced, with the assent of the parties, that the case would be heard on the issues formulated and set forth in its order of April 6, 1948, and that the court would not restrict itself to ordering a reargument of the appeal if the charges were sustained (Op. 45). Thus, the court below wisely insisted that the charges and issues be plainly and fully set forth before the trial.

* Record of pre-trial hearing of March 23, 1948.

However, it is not necessary to plead fraud which has been perpetrated on the court. In *Primeau* v. *Granfield*, 193 F. 911 (C. C. A. 2), fraud was first asserted in the appellate court by Granfield. Primeau argued that because that issue was not raised in the pleadings it should not be considered. As to this the court said (p. 913):

> "But from the very nature of the fundamental principles involved it is manifest that the question is deeper than one of pleading. The court must consider it not because it is a matter of defense to the defendant but because it is against public policy to hear the case if the charge be established. The court acts for its own protection rather than for the protection of the defendant. When fraud or illegality is disclosed in a case, public policy requires a court to refuse its aid irrespective of the state of the pleadings and regardless of the fact that with fraud and illegality absent the plaintiff might appear entitled to relief. McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117; Memphis Keely Inst. v. Leslie E. Keeley Co., 155 Fed. 964, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921; Teoli v. Nardolillo, 23 R. I. 87, 49 Atl. 489; Drake v. Lauer, 93 App. Div. 86, 86 N. Y. Supp. 986.
>
> "It is our duty then to examine into the charge of fraudulent conspiracy notwithstanding that it is not set up in the pleadings, and if we find it established we shall be constrained to shut the door of the court against the plaintiff in limine without passing upon the merits of his demand for an accounting."

See also:

Bentley v. *Tibbals*, 223 F. 247 (C. C. A. 2);

Bell & Howell Co. v. *Bliss*, 262 F. 130 (C. C. A. 4);

Renaud Sales Co. Inc. v. *Davis—Davis* v. *Renaud Sales Co. Inc.*, 104 F. (2d) 683 (C. C. A. 1);

General Theatres, Inc. v. *Metro-Goldwyn-Mayer Dist. Corp., et al.*, 9 F. S. 546, 549 (D. C. Colorado).

Thus, it is clear that the court below was not limited to Singer's petition for reargument, but had the power and the duty to formulate the issue on the basis of the record as made by the parties prior to the order of April 6, 1948. These issues were so formulated and tried not only with the consent of all parties concerned but after submission to all parties with a request for suggestions and objections if any.

II.

(a) A court's power to inquire into the integrity of its own judgment is settled. See *Root* v. *Universal*, 328 U. S. 575, 580, where this Court said:

> "The inherent power of a federal court to investigate whether a judgment was obtained by fraud is beyond question. Hazel-Atlas Co. v. Hartford Empire Co., 322 U. S. 238."

(b) That such an inquiry is not foreclosed by the expiration of the term is also settled. See *Hazel-Atlas* v. *Hartford Empire, supra* (p. 245), where this Court said, after discussing the question of "term" at some length:

> "But whatever form the relief has taken in particular cases, the net result in every case has been the same: where the situation has required the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away."

(c) The court below had the right to hear evidence and decide disputed questions of fact in this case. See the *Universal* case (p. 580) where this Court said:

> "The power to unearth such a fraud is the power to unearth it effectively. Accordingly, a federal court may bring before it by appropriate means all those who may be affected by the outcome of its investigation."

Since a court has the power to inquire into the integrity of its judgment, as stated by Justice FRANKFURTER in the *Universal* case, it is unrealistic to suggest that this power does not include the right to hear evidence on the question of whether or not its judgment has been fraudulently obtained.

In the *Hazel-Atlas* case it was held (pp. 249-250) that the Circuit Court had both the duty and the power to vacate its own fraudulently obtained judgment, on the basis of a record made up of opposing affidavits presented by the parties. Certainly if the court had the power to act on the basis of affidavits, it had the power to hear oral evidence to ascertain the facts.

Moreover, in the *Universal* case (p. 579) this Court approved the payment of Master White's fees, thus tacitly sanctioning the appointment of a Master. It follows that if the Court of Appeals had the power to appoint a Master to act for it, it had the power to hear and determine for itself.

It is to be noted that Courts of Appeal may exercise original jurisdiction "to aid, protect or enforce their appellate jurisdiction". *Hall, et al.* v. *United States*, 78 F. (2d) 168, 170 citing *United States* v. *Mayer*, 235 U. S. 55, 65, 66. Certainly, to determine whether or not there

is any fraud involved in the Court of Appeals' judgment handed down in 1938 is "to aid, protect, or enforce their appellate jurisdiction".

There is no doubt as to the power of the court below to act as it did in this instance, where all the usual safeguards of an adversary proceeding were scrupulously observed.

III.

The evidence supports the court's finding that American employed Kaufman with the expectation that the latter would "exercise or endeavor to exercise an improper influence upon Judge DAVIS to secure judicial action from him favorable to American's interest in this suit" (Op. 44, 52). The facts as to Kaufman's employment by American are well set forth in the Government's brief in opposition under the main heading, "Argument" and sub-heading "Factual Questions", and Singer hereby adopts such statement by reference and includes it herein. In addition, Singer respectfully calls this Court's attention to the following:

(a) American withheld the fact that it was Becker who recommended Kaufman to the Frankels. At the very first hearing on Singer's petition on March 6, 1945, the court asked who recommended Kaufman to the Frankels. Counsel for American said he did not know but, "I can find out" (p.t. 44, 45).* However, it was not until the Spring of 1948 at the examination of Harry Frankel by the Government that the answer to this very pertinent question was brought out into the open (R. 2727). The concealment for three years of this important fact is consistent neither with a sense of innocence nor with American's protestations of complete frankness (p.t. 33, 34).* Becker was attorney for

* Record of hearing on Singer's petition for reargument—March 6, 1945.

William Fox, confessed briber of Davis during the very time when Fox was bribing Davis and during the time when the scandalous Fox bankruptcy proceedings were in progress in the New Jersey courts (Op. 48, 49). The record shows that at one time the Frankels were friends and business partners of William Fox and through him became friendly with Murray Becker (R. 2727, 2736, 2743).

(b) American argues (Pet. 8, 9) that the dishonest relationship between Kaufman and Davis was not common knowledge at the time they retained Kaufman and that therefore they could not possibly have had any evil intent in doing so. But the critical fact is not whether the relationship of Kaufman and Davis was common knowledge but whether it was known to Becker who was a friend of the Frankels and who recommended Kaufman. Kaufman and Davis were intimate and notoriously so and Becker was well known to Kaufman (Op. 49, R. 2628). The Frankels, Fox and Becker, were old acquaintances (R. 2555, 2556) and they must have known of the relationship between Davis and Kaufman (Op. 49). The hiring of Kaufman, despite the fact that he could furnish no legitimate services, has never been explained and is strong evidence that they had some such knowledge (Op. 50, R. 2593). The Frankels acted most promptly when Murray Becker said to them in regard to Kaufman, "I got just the man for you" (R. 2597).

In spite of the fact that Louis Frankel made a trip to New York for the purpose of consulting with the family's old time legal adviser, Mr. Otterbourg, he did not do so. Instead, the Frankel brothers visited with Becker and accepted his recommendation of Kaufman, without consultation with Mr. Otterbourg, or with other members of his firm, or with the Frankels' New York patent lawyers, Levensohn, Niner & Levensohn (R. 2593, 2597, 2730).

(c) In trying to explain the hiring of Kaufman, American stresses the fact that Kaufman had correspondence in regard to the accounting proceedings and some minor and ancillary matters from about 1938 until 1941 (Pet. 15, Op. 51, 52). It should be remembered, however, that at that time Kaufman had a 25% interest in what he and the Frankels hoped would be a very substantial recovery (R. 2616, Op. 51). This accounts for his being kept informed as to the proceedings even though he performed no legal services and was not expected to do so (Op. 51, 52).

(d) American makes much of the fact that Kaufman was able to secure the services of Darby and Haight for only $3,500 and claims that they could not have done this directly. This argument is fallacious because Stoughten, American's patent attorney, knew Darby and Haight, and could have brought them into the case (R. 2606). By having Kaufman do it, American paid $6,500 and gave a contingent 25% in the recovery (Op. 51). This would have amounted to a large sum if American's claim was ultimately sustained, as well it might have been, when the case went back to Judge DAVIS' court on appeal in the accounting. Such extraordinary fees are not given one having "no ability" in the particular case unless success is practically assured.

IV.

Petitioner has no *right* to a review (Pet. 28) and because of the circumstances of this case should not be granted a review as a matter of grace.

The present proceeding is primarily a hearing by the Court of Appeals of the Third Circuit into the integrity of one of its own judgments and except for obvious error (not shown here) should not be disturbed by this Court. In this instance, American had a complete and fair hearing

of an unusual nature, in that it was before three judges, SOPER, MAHONEY and PRETTYMAN, experienced in both trial and appellate work. There was no dissent; the decision was unanimous. Preliminary hearings were had; the parties were heard and had an opportunity to discuss and suggest proposed procedure. The Government was enjoined to produce all the evidence, regardless of whether it pointed to guilt or innocence. The parties were privileged to call or have the Government call any witnesses they desired. All parties were given opportunity to examine or cross examine fully. After the trial, lengthy arguments were heard by the court, with practically no limitation on the time which the parties were given. Only after thus hearing the evidence, seeing the witnesses and listening to argument did the court hand down its opinion. In view of the unusual constitution and experience of the court and the fact that the court's findings are fully and amply supported by the evidence, they should not be disturbed.

Petitioner's fourth reason relied on for the allowance of the writ (Pet. 18, 19) has no basis in fact, because the court below purposely refrained from deciding whether or not Kaufman actually succeeded in exerting an improper influence on Judge DAVIS (Op. 53, 54). It only found that American hired Kaufman with the expectation that Kaufman would do so (Op. 52). Petitioner's statement that "The decision below adjudicates corruption on the part of a former judge of that court" is not a correct statement of the court's ruling herein.

Conclusion

The findings of fact are amply supported by the evidence and the petition fails to point out any sufficient ground for granting the writ. Therefore, it is respectfully submitted that the petition should be denied.

NEWTON A. BURGESS,
JOHN F. RYAN,
REGINALD HICKS,
Counsel for Respondent.

Dated: Dec. 29, 1948.

FILE COPY

No. 441

Supreme Court of the United States

OCTOBER TERM, 1948.

AMERICAN SAFETY TABLE COMPANY,

Petitioner,

—against—

SINGER SEWING MACHINE COMPANY,

Respondent.

PETITION AND MOTION TO DISPENSE WITH PRINTING RECORD REQUIRED UNDER RULE XXXVIII-1.

EDWIN M. OTTERBOURG,
LEON J. OBERMAYER,
Attorneys for Petitioner.

THE COURT PRESS, N. Y. C.

Supreme Court of the United States

OCTOBER TERM, 1948.

AMERICAN SAFETY TABLE COMPANY,

Petitioner,

—against—

SINGER SEWING MACHINE COMPANY,

Respondent.

Now comes the American Safety Table Company, the petitioner herein, and on the annexed petition verified the 12th day of November, 1948, and on the record in this matter on file with the Clerk of this Court, hereby moves this Court for an order dispensing with the printing of said record for the purpose of application to this Court for a writ of certiorari to the Court of Appeals for the Third Circuit.

Dated: November 12, 1948.

Yours, etc.,

EDWIN M. OTTERBOURG,
LEON J. OBERMAYER,
Attorneys for
American Safety Table Company.

Supreme Court of the United States

OCTOBER TERM, 1948.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

—against—

SINGER SEWING MACHINE COMPANY,
Respondent.

Petition and Motion to Dispense with Printing Record Required Under Rule XXXVIII-1.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of American Safety Table Company respectfully shows:

1. Your petitioner simultaneously herewith is filing its petition for a writ of certiorari to issue to the United States Court of Appeals for the Third Circuit to review the order of that Court entered therein on the 6th day of July, 1948, and the proceedings in which that order resulted.

2. The opinion of the United States Court of Appeals, which was followed by the said order, has not as yet been officially reported, but has been unofficially reported in 169 Fed. (2d) 514.

3. The proceeding in which said order was entered was to a certain extent consolidated with the proceed-

ing in the case of *Root Refining Co.* v. *Universal Oil Products Company,* and for the sake of convenience the two proceedings were tried together.

4. In the proceeding, the United States Court of Appeals acted as the court of first instance and took testimony and received exhibits, and unlike the usual appeal in that Court, there was no printed record.

5. The taking of testimony occupied the greater part of ten days, and the stenographer's minutes of those particular hearings covered 3,120 pages. Exhibits to the number of 344 were introduced. Previous hearings covered 363 pages and pleadings, orders, etc., covered an additional 165 pages. The entire record comprises approximately 4,600 pages.

6. The expense of printing that record is a matter of considerable importance to your petitioner, which is not a large or wealthy corporation.

WHEREFORE, your petitioner prays for an order dispensing with the printing of the record for the purpose of consideration of the petition for the issuance of the writ of certiorari under Rule XXXVIII-1.

Dated: November 12, 1948.

Respectfully submitted,

AMERICAN SAFETY TABLE COMPANY,
By: LOUIS FRANKEL.

EDWIN M. OTTERBOURG,
LEON J. OBERMAYER,
Attorneys for Petitioner.

State of New York,
County of New York—ss.:

LOUIS FRANKEL, being duly sworn, deposes and says: That he is the President of American Safety Table Company, the petitioner herein; that he has read the foregoing petition and knows the contents thereof; and that the same is true.

LOUIS FRANKEL.

Sworn to before me this
12th day of November, 1948.

STANLEY H. SCHINDLER
Notary Public State of New York
N. Y. Co. Clks. #2558
My Commission Expires Mar. 30, 1950

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CITATIONS

CASES:

MISCELLANEOUS:

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 441

AMERICAN SAFETY TABLE COMPANY, *Petitioner*

v.

SINGER SEWING MACHINE COMPANY

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN OPPOSITION [1]

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (Op. 41-54)[2] is reported at 169 F. 2d 514, 539.

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[1] This case is a companion case to *Universal Oil Products Co.* v. *Root Refining Co.*, Nos. 439-440, this Term (the *Root* cases). As in the *Root* cases, the United States, although designated as *amicus curiae*, was more than merely *amicus*. The court below authorized the appearance of the United States as *amicus* by its order of June 20, 1947 (Op. 43). The duties of the United States in the court below, as in the *Root* cases, were to "present to the court the available evidence bearing upon the charges whether or not in support thereof, to the end that the truth might be ascertained' (Op. 44-45).

[2] Petitioner here, as in the *Root* cases, has moved to dispense with printing of the voluminous record for the purposes of the petition for writ of certiorari. The United States does not oppose the granting of this motion. However, in the *Root* cases, we have filed printed copies of the opinion below in these cases which includes the opinion in this case. The references in this brief to (Op. .....) are to that printed opinion.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered July 6, 1948. The time for filing a petition for writ of certiorari was extended on September 10, 1948, by Mr. Justice Burton to and including December 1, 1948. The petition for writ of certiorari was filed on December 1, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether, in the exercise of its inherent power to protect the integrity of its judgments, a court of appeals has jurisdiction (a) to institute after the expiration of the term an inquiry into whether a judgment has been tainted by corruption; (b) to hear the evidence relative thereto; and (c) upon finding that the judgment was corrupt, to direct that the judgment be vacated and the complaint dismissed, although respondent Singer Sewing Machine Company originally prayed only for reargument.

2. Whether the evidence here supported the court's finding that American Safety Table Company employed Morgan S. Kaufman with the expectation that he would improperly influence the action of Judge J. Warren Davis, formerly a judge of the Circuit Court of Appeals for the Third Circuit, in this case.

STATEMENT

On March 9, 1938, a court consisting of Buffington and Davis, Circuit Judges, and Johnson, District Judge, in an opinion by Judge Buffington, reversed the decision of the District Court of the Eastern District of Pennsylvania and held that a patent of American Safety Table Company (American) was valid and infringed by Singer Sewing Machine Company (Singer), 95 F. 2d 543. After this Court's denial of certiorari (305 U. S. 622), the case was remanded to the district court where a master was apopinted to take account of damages and profits.[3]

After the adverse decision in the district court, American had added a New York patent firm to its staff on the case, and after its main brief in the appeal was filed, it put the appeal in charge of Morgan S. Kaufman, who retained Thomas G. Haight and Samuel E. Darby, patent practitioners, who prepared reply briefs and argued the appeal. (Op. 41-42.)

On September 26, 1944, after the court below on June 15, 1944, had vacated its original judgments in the *Root* cases (Br. for U. S. in Opp. in Nos. 439, 440, pp. 4-5), Singer filed a petition with the court below for recall of mandate and for reargument on the merits on the ground that there had existed a corrupt and illicit combination between Kaufman

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[3] The proceeding before the master is still pending.

and Judge Davis to obstruct justice.[4] In reply, American denied, *inter alia*, any improper conduct on its part or the existence of any unlawful combination between Davis and Kaufman in this case. The questions thus raised were argued before the court below March 6, 1945, and decisions was withheld during the proceedings then pending in the *Root* cases. On June 20, 1947, the court simultaneously with its similar order in the *Root* cases (Br. in Opp. Nos. 439-440, pp. 5-6), ordered American to show cause why the relief prayed by Singer should not be granted by reason of American's alleged corruption practiced on the court, and further authorized the Attorney General to appear as *amicus*. In reply, American reaffirmed its denial of any improper conduct in this case on its part or on the part of Kaufman. The designation of the judges for this case was made by the Chief Justice and proceedings were taken paralleling those in the *Root* cases (Br. in Opp. Nos. 439-440, pp. 6-7).

On April 6, 1948, the court issued an order substantially the same as that issued in the *Root* cases

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[4] The petition also charged that Judge Buffington was disqualified to sit in the bearing of the appeal because of the infirmities of old age and his consequent reliance upon Judge Davis. By supplement to the petition, Singer charged that Judge Johnson was also disqualified and unfit to participate by reason of his improper official conduct as District Judge in the Middle District of Pennsylvania as set out in Report No. 1639 of the House Committee on the Judiciary, 79th Cong., 2d sess.

(Br. in Opp. Nos. 439-440, pp. 7-9). In this case, the court, as it formulated the charges that had been made,[5] undertook to determine, *inter alia* (Op. 44):

> (c) Whether Morgan S. Kaufman was employed or retained by American Safety Table Company in connection with this case and, if so, whether the purpose of such employment or retainer was with the expectation of American Safety Table Company that Kaufman would exercise or endeavor to exercise an improper influence upon Judge Davis in order to secure favorable judicial action by him in connection with this case.[6]

This case was consolidated for trial with the *Root* cases, as subsequently stipulated, to the extent that the testimony of the witnesses and the exhibits in that case should be offered, as part of the record here, subject to objection on the ground of admissibility and without limitation upon the right of either party to offer additional testimony. Hearings of the testimony were begun on May 10, 1948

[5] The United States and Singer had filed statements alleging the substance of these charges (Documents N, P, and R which are on file with the Court as part of the original transcript).

[6] At a subsequent pretrial conference at which the question whether the inquiry should be limited to the propriety of vacating the court's original judgment and submitting the case to the court for reargument, the parties, including American, assented to the hearing of the case upon the issues formulated in the order of April 6 and that the court should not restrict itself, in case the charges were sustained, to ordering a reargument on the appeal (Op. 45).

and were conducted in accordance with the order of April 6 and the stipulation of the parties.

On July 6, 1948, the court issued its findings and opinion based on the evidence introduced at the hearings. It found that Kaufman "had only one asset to offer his employer [American], and that was, his personal intimacy and influence with Judge Davis. We cannot escape the conclusion that it was for this purpose, and this purpose only, that he was employed by American in this case." (Op. 52.) In view of this finding, the court, applying the principle that one who comes into a court of equity must come with clean hands and a suitor who does not have clean hands will be denied all relief, whatever the merits of his claim, ordered that its original mandate be recalled, that its original judgment be vacated and the case remanded to the district court with directions to vacate its judgment and dismiss the complaint (Op. 53).

ARGUMENT

The primary questions raised by American's petition are, as in the *Root* cases, factual in nature. Here, as in *Root*, the jurisdictional contentions advanced have been passed on and rejected in *Hazel-Atlas Co.* v. *Hartford-Empire Co.*, 322 U. S. 238, and *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575. Moreover, no questions of law on the merits are raised; petitioner does not question that if the findings below are supported by ample evidence, the court below had power at least, to vacate its judgment and order reargument. Pe-

titioner does, however, attack the court's findings of fact; these findings were made by the same specially designated court that made the findings in the *Root* cases, and are, we submit, clearly supported by ample evidence. There is, accordingly, no reason for this Court to review factual questions which of themselves do not warrant certiorari.[7]

1. *Jurisdictional Contentions*: (a) The fallacy in American's contentions that the court was without jurisdiction because there was no "case or controversy" pending before it (Pet. 35-36) and that the court, as an appellate court, was without jurisdiction itself to hear the evidence bearing on the charges of fraud perpetrated on it (Pet. 32-34) has already been discussed in our Brief in Opposition in the *Root* cases (pp. 11-15), to which we respectfully refer the Court. As to the "case or controversy" argument, there is an additional reason on the facts of this case why the contention is unsound; here, unlike the *Root* cases, the party against whom the court's original judgment was entered is actively interested and participated in the proceedings in the court below.

(b) American's further claim that the court is without jurisdiction to inquire into the integrity of one of its judgments after the expiration of the

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[7] Contrary to petitioner's suggestion (Pet. pp. 24-25) "the well settled rule * * * [is] that an appellate review is not essential to due process of law, but is a matter of grace." *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533, 536, and cases there cited.

term in which the judgment was entered was squarely rejected by this Court in the *Hazel-Atlas* case. It was there pointed out that "where the situation has required, the court has, in some manner, devitalized the judgment even though the term at which it was entered had long since passed away" (322 U. S. at 245). See, also, *Art Metal Works* v. *Abraham & Straus,* 107 F. 2d 940 (C. C. A. 2); *id,* 107 F. 2d 944 (C. C. A. 2), certiorari denied, 308 U. S. 621.

(c) American's final contention that the court improperly went beyond the relief prayed by Singer for reargument of the appeals, and ordered the complaint dismissed ignores the nature and effect of the proceedings below. Although Singer called the court's attention to the possible corruption in the judgment in its petition for reargument, the inquiry into the integrity of that judgment was not purely a controversy between private litigants but rather an inquiry into "a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society." *Hazel-Atlas* case, 322 U. S. at 246. And accordingly, the court's disposition of the case is measured against the wrong done to these institutions, and not merely by the relief prayed by an adverse private litigant. See *Hazel-Atlas* case, 322 U. S. at 250-251. Moreover, American failed to object to the court's proposal that it not restrict

itself to ordering reargument, if the charges were sustained (Hearing of March 23, 1948, pp. 162, 164), and thereafter explicitly assented to this procedure. See *supra*, p. 5; fn. 6, p. 6.

2. *Factual Questions*: As in the *Root* cases, American's attack on the findings that it employed Kaufman for the purpose of improperly influencing Judge Davis' action in this case does not warrant an exception from the usual rule against review of factual questions. These findings were made by an unanimous court, composed of three judges who normally do not sit in the Third Circuit and who were specially designated by the Chief Justice to act in this case. The findings were arrived at after the court itself heard the testimony and observed the demeanor of the witnesses in the course of direct and cross examination (cf. Rule 52(a) of the Federal Rules of Civil Procedure), and are supported by ample evidence, as the court's findings of subsidiary facts clearly demonstrate. These subsidiary findings, which are largely undisputed except as to the inferences and conclusions to be drawn therefrom, may be summarized as follows:

Since this case was thought to be of great importance to American, American had as its leading attorney in the district court, Augustus B. Stoughton, the dean of the Philadelphia patent bar, who had practiced law since 1888 and who was thoroughly familiar with conditions in the Third Cir-

cuit. When the case was lost, the firm of Levinsohn, Neiner and Levinsohn, a New York patent firm, was also retained. After the main appellate brief was filed, the Frankel brothers, who had established American and owned its stock, were not satisfied. Louis Frankel, American's president, determined to go to New York to confer with the well-known law firm of Otterbourg, Steindler, Houston and Rosen, which had guided the Frankel family in legal matters since 1920. Charles A. Houston of that firm was familiar with patent matters and actually conducted the final proceedings for an accounting before the master in this case. (Op. 47-48.) Thus, as the court commented (Op. 48), "Obviously American did not lack access to experienced men who could aid them in the selection of an additional counsel for the appeal if any were necessary."

On his visit to New York, however, Louis Frankel did not visit either the Otterbourg or the Levinsohn firm. Instead, his brother David Frankel took him to see Murray Becker, the attorney for William Fox. In the course of the visit having to do with business transactions between the Frankels and Fox, the Frankels and Becker discussed this case, and Becker advised the Frankels to retain Kaufman to handle the appeal for them (Op. 48).[8]

Thus it was Murray Becker, Fox's attorney, who recommended the retention of Kaufman. Becker

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[8] Kaufman was disbarred from practice in the court below on November 10, 1944 (Op. 53, fn. 9).

was well acquainted with the Circuit Court of Appeals for the Third Circuit, and especially the Court composed of Judges Buffington, Davis and Thompson. With Kaufman retained as local counsel he had appeared successfully (on a $10,000 plus contingent fee basis) before that court as counsel for Fox in *Altoona Publix Theatres Inc.* v. *American Tri-Ergon Corporation* (opinion by Judge Buffington, dated August 6, 1934), 72 F. 2d 53, reversed, 294 U. S. 477. Becker had also achieved remarkable success for the Fox interests in the appeals to that court in the Fox bankruptcy matters.[9] During the course of this bankruptcy litigation, which was still in active progress at the time Becker recommended Kaufman to the Frankels, Becker had ample opportunity to learn that Davis and Kaufman were on intimate terms and that Davis' personal financial affairs had reached a crisis. Moreover, subsequently in 1940, when the relationship between Fox, Davis and Kaufman was under investigation, it was Becker who called Kaufman, to arrange a conference between Davis and Fox. (Op. 48-49.)

When Kaufman was retained, the Frankels agreed to advance him $5,000 to pay the lawyer's fees and costs of the appeal, and in addition, promised him 25% of any money which American might

[9] In the *Root* cases, the court found that there had existed an illicit conspiracy to obstruct justice among Davis, Kaufman and Fox in regard to these appeals (Op. 39).

recover from Singer, against which percentage the $5,000 was to be credited. American did pay Kaufman $5,000, and he retained Thomas Haight of Jersey City and Samuel Darby of New York, well qualified patent lawyers who prepared the reply brief with the aid of the Levinsohn firm and argued the case in the Court of Appeals. Kaufman paid Darby $1,750 and Haight $1,250 for these services, and kept $2,000 for himself. Subsequently, when certiorari was sought and denied, Kaufman received an additional $1,500 from American; he paid Darby $500 for preparing the brief in opposition and kept $1,000 himself. Thus, the lawyers who did all the actual work received $3,500 in the aggregate and Kaufman retained $3,000 himself. In addition, of course, Kaufman had a 25% interest in American's claim of $737,450.62, against Singer (Kaufman's interest amounted to about $184,000); although the master initially awarded only $40,362.97, American excepted to the award as insufficient on the ground that the master failed to take into account certain devices of Singer's, which American claimed to be infringements of the patent. The decision on that question has been held in abeyance pending this proceeding (Op. 50-51).[10]

The court further found that despite the sums actually paid and the promise of large additional

[10] The decision of the district court on the master's award would, of course, have been appealable to the Third Circuit.

payments in case of success, Kaufman was not competent to make any legitimate contributions to the case, and that he in fact made no such contributions (Op. 51). Although Frankel testified that Kaufman was retained as general counsel in this case, so that he might in turn retain competent patent lawyers to prepare the reply brief and argue the case in the appellate court, Kaufman himself, though experienced in bankruptcy matters, was not competent to argue or brief a patent case. After his appointment as the receiver in bankruptcy in S. W. Strauss Company, his main occupation, apart from the receivership, had been the buying and selling of securities on the stock market; he practically gave up the practice of the law. Furthermore, he was not needed as local counsel; there is seldom need for local counsel in respect to a case in the Court of Appeals, and if such need had arisen, Kaufman, whose headquarters were in New York, was not conveniently available, whereas Stoughton maintained his offices in Philadelphia where the court holds its regular sessions and the clerk's offices are located. (Op. 50.) Moreover, the court found that Kaufman rendered no substantial legal services in the litigation. His file contained only copies of the opinion, briefs and other papers prepared by the patent lawyers. While it also contained 61 letters written by or to him about the case, they were routine in nature and showed merely that his interest in the progress of

the case, arranging conferences and conveying information from the Frankels to Darby, were due, in large measure, to his substantial contingent share. "Nothing in the file indicates that he made any intellectual contribution to the case or performed any routine service that would not have been performed as a matter of course by the active lawyers in the case if Kaufman had not been employed." (Op. 51-52.)

These findings, that Kaufman was recommended by Murray Becker, who was well acquainted with the conditions in the Third Circuit, particularly the relationship between Davis and Kaufman; that Kaufman was retained at a substantial fee; and that he was neither competent to, nor in fact did, perform any legitimate services in connection with the case, are ample, we submit, to support the court's conclusion that Kaufman had only one asset to offer his employer, and that was his personal intimacy and influence with Judge Davis. "We cannot escape the conclusion that it was for this purpose, and this purpose only, that he was employed by American in this case." (Op. 52.)

CONCLUSION

The court below had jurisdiction to proceed as it did in this case and its findings are supported by ample evidence. The petition for a writ of certiorari should be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

H. GRAHAM MORISON,
Assistant Attorney General.

ALFRED C. AURICH,
Special Assistant to the Attorney General.

PAUL A. SWEENEY,
MELVIN RICHTER,
Attorneys.

January, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 441.

AMERICAN SAFETY TABLE COMPANY,
Petitioner,

vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

EDWIN M. OTTERBOURG,
LEON J. OBERMAYER,
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THE COURT PRESS, N. Y. C.

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CASES CITED:

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AMERICAN SAFETY TABLE COMPANY,
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vs.

SINGER SEWING MACHINE COMPANY,
Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, American Safety Table Company, prays this Court for a rehearing pursuant to Rule 33, subdivision 2 of this Court. Petitioner has confined itself on this application for rehearing to substantial grounds for the granting of the writ available to it although not previously presented.

Unlike the Universal cases (nos. 439 and 440), the court below made no finding in this case that the original judgment in favor of American had been procured by any improper influence upon any member of that court. Your petitioner therefore earnestly

urges that its present application be considered separate from that made by Universal in number 439 and 440 in order that justice may be done it.

The following substantial grounds for allowance of the writ demonstrate again that your petitioner should not be deprived of its entire cause of action solely because it later developed that the attorney whom it unfortunately employed was in other cases involved in a scandalous relation with one of the judges of the court.

In similar siuations in another court, to which we shall refer, litigants were required to reargue the mandates said to have been affected. No court ever before deprived the litigant under such circumstances of its entire cause of action.

I.

In the petition and briefs submitted on the original application for the writ herein, the court's attention was not called to the precedent established by the Second Circuit in the Manton situation where that Court of Appeals was called upon to deal with private litigation allegedly affected by the corrupt situation existing between certain attorneys and a member of that court. Judge Manton, certain lawyers and certain officers and agents of the litigants had been convicted (*U. S.* v. *Manton,* 107 Fed. (2d) 834). The evidence was that in the private litigation of *Art Metal Works* v. *Abraham and Straus* (Nos. 1 and 2), the President of the company was one of the conspirators (see 107 Fed. (2d) at 840). In the cases of *Electric Auto-Lite Co.* v. *P. & D. Manufacturing Co.,* and *General Motors Corp.* v. *Preferred Electric and Wire Corp.,* it was shown that the litigants'

patent attorney, John L. Lotsch, was one of the conspirators (107 Fed. (2d) 841).

Nevertheless, the Second Circuit did not punish the litigants and directed no such drastic steps as an outright dismissal of the complaints in the civil actions. In the *Art Metal Works* case, reargument was ordered and had (107 Fed. (2d) 940 and 944). In the *Electric Auto-Lite Co.* and *General Motors Corp.* cases, the litigants were permitted to consent to a reargument and such a reargument was had on the merits (109 Fed. (2d) 566 and 615).

Compare what has happened to your petitioner as a private litigant in the Third Circuit. Although twice tried, neither Judge Davis nor the lawyer Kaufman were ever convicted (Record, p. 2784). Judge Manton and his conspirators were. In its opinion in the *American* case, the court below has failed to find any conspiracy so far as American and the court are concerned.

All that Singer asked for was a reargument. The court itself suggested that American could avoid the expense of the trial by consenting to such a reargument (March 23, 1948, Hearing, pp. 54, 55, 126, 139 through 144), and then when American did offer to reargue (see Minutes, p. 2526), the court itself refused the offer (Minutes, p. 1159).

The court below has graphically described its opposition at a hearing affecting costs as follows:

> "It may also be noted as indicating the character or attitude of Singer in the beginning, that at

first its application was confined to a petition for a recall of the mandate and a reargument of the case.

"It was upon the insistence of the Court that the matter was not confined merely to reargument, and Singer has gained far more through the insistence of this Court on that point than it originally sought" (Minutes of October 25, 1948, Hearing, p. 25).

And yet upon the completion of the whole investigation, the court below could not find that American's judgment against Singer had been procured by improper influence exerted upon any member of the court. Nevertheless and contrary to all available precedent, the Third Circuit instead of setting aside the mandate and ordering a reargument, has dismissed American's complaint.

Petitioner submits as a first additional ground for the allowance of this writ the following proposition:

(1) The court below deviated from proper procedure established by precedent and erred as a matter of law when it dismissed American's complaint instead of directing a reargument of the appeal.

Why should Singer, as the court below itself has said, gain "far more through the insistence of this Court * * * than it originally sought?"

II.

This Court's attention has not heretofore been called to the important fact that when the complexity and expense of the proposed trial became apparent in pretrial conference in these proceedings, your petitioner offered to consent to the relief requested by Singer and reargue the appeal (as had been permitted by the Second Circuit in the private litigations to which reference was made above).

Petitioner does not question the power of the court below, particularly in view of the unsatisfactory result that both criminal trials against Judge Davis and Kaufman had resulted in a hung jury, to insist on going forward with a complete investigation in which counsel for all of the parties, as officers of the court, were required to assist. But under the circumstances in American's case as distinguished from that in Universal, the petitioner here submits as a second substantial question not previously raised the following:

(2) After the court below had refused American's offer to consent to reargument, had insisted upon a complete investigation and had failed to find in American's case that anyone of the judges had been improperly influenced, it was an abuse of the court's discretion to have dismissed American's complaint rather than setting aside the mandate and directing a reargument of the appeal on its merits.

III.

As noted above, the investigation proceeded at the insistence of the court, which desired to get at all of the facts and to determine once and for all whether the conspiracy existed between Davis and Kaufman to obstruct justice in the Third Circuit.

As clearly appears in the opinion of the court below, the witness, Murray Becker, who is a practicing attorney in New York City, was alleged to have had a most important part in the alleged conspiracy (see Op., pp. 33, 48, 49, 53 and n. 8, p. 53). Becker was not called in either of the criminal cases against Davis and Kaufman, in the grand jury investigations, in the disciplinary proceedings both State and Federal nor before Special Master White (Minutes, p. 3288).

But here, before the Third Circuit, the United States, as *amicus* promised to produce his testimony, at least in deposition form, and American had every right to rely on this promise. (See Notice of Time and Place of Taking of Depositions served on the parties March 25, 1948 and the order authorizing the taking of such depositions filed March 27, 1948 herein.) However, no deposition was taken and no notice or explanation was ever given to American or to the Court by *amicus* for failing to do so. Finally on the trial itself, Becker was not produced and no explanation was given therefor (Op., p. 53, n. 8).

Nevertheless, as the opinion of the court below in American's case shows, it is based on a detailed description of Becker's alleged knowledge of the relations between Judge Davis and Kaufman and an assumption by the court, in the face of the uncontradicted and categorical denials made before it by the

officers of American, that American learned of these improper relations from Becker.

It is inconceivable that in any complete investigation, such as that upon which the court apparently insisted, the court should have permitted the nonproduction of Becker by *amicus* without public explanation. Certainly the invesigation was incomplete without Becker's appearance or testimony. It left the court, as its opinion shows, the problem of guessing at the truth based upon inferences of what Becker knew and what American knew Becker knew about the relationship between Kaufman and Davis.

We assume in this application for rehearing that the court below had the power to make inferences from the evidence but petitioner earnestly submits as a third additional substantial ground for the granting of the writ the following:

> **(3) In view of the incompleteness of the investigation resulting from the court's failure to require the production of a most material witness and the court's insistence on basing its findings in American's case on inference and suspicion, it was error and an abuse of discretion by the court below to dismiss the complaint rather than to set aside the mandate and direct a reargument.**

This is the first time, so far as counsel has been able to find, that in the absence of any finding that improper influence had been employed on the court, the corporate litigant's complaint had been dismissed merely upon the assumption that the corporate officer had hired a lawyer whom he assumed was personally

intimate and had influence with a member of the court. Previously, no such penalty had been imposed on a corporate litigant even where it had been proved in a criminal trial that improper influence had been employed on a member of the court (*Art Metal Works v. Abraham and Straus, supra*, p. 3).

In this case there being no proof or finding that an improper influence by Kaufman had been brought to bear upon Judge Davis, or that the judgment had been affected thereby, the penal nature of the decision by the court below was unwarranted.

Petitioner therefore submits the following as an additional substantial ground for the granting of the writ:

(4) In the absence of a finding by the court below that any improper influence by Kaufman had been brought to bear upon Judge Davis in American's case, or that the judgment had been affected thereby, it was error for the court below, upon the assumption that the lawyer was employed for an ulterior purpose, to dismiss American's complaint rather than to direct a reargument.

The patent litigation instituted by American many years ago ought to be decided upon the merits of that litigation. To dismiss the entire proceeding because of the unfortunate employment of a lawyer later discovered to have been involved in a fraudulent relationship with one of the judges of the court, was unnecessary, extraordinarily punitive and not required

either to uphold the integrity of the court or to do justice between Singer and American.

The petitioner therefore respectfully prays that for the reasons set forth herein this Court grant this petition for rehearing and issue its writ of certiorari for the purpose of reviewing the action in this case by the Court of Appeals for the Third Circuit.

January 29, 1949.

Respectfully submitted,

AMERICAN SAFETY TABLE COMPANY,
Petitioner.

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Certificate of Counsel.

The undersigned hereby certifies that the foregoing petition for rehearing is presented in good faith and not for delay and that the petition is restricted to the grounds above specified.

EDWIN M. OTTERBOURG.